Meyers Transport of New York, Inc. *and* Local 707, International Brotherhood of Teamsters, AFL–CIO and Local 713, International Brotherhood of Trade Unions. Case 29–CA–23523

April 14, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 5, 2001, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, cross-exceptions, and a supporting brief. The Respondent subsequently filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Meyers Transport of New York, Inc., Melville, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing or urging its employees to sign authorization cards for or otherwise support Local 713, International Brotherhood of Trade Unions (Local 713).

(b) Threatening its employees with discharge or other reprisals unless they sign authorization cards for or otherwise support Local 713.

(c) Promising its employees wage increases, medical benefits, or other improvements in their terms and conditions of employment in order to induce them to sign authorization cards for or otherwise support Local 713.

(d) Recognizing or bargaining with Local 713 as the exclusive representative of its employees employed at its facility in Melville, New York, unless and until Local 713 is certified by the Board as the collective-bargaining representative of those employees.

(e) Giving effect to the collective-bargaining agreement that it executed with Local 713 on May 22, 2000, and any modifications or extensions of that agreement; provided, however, that nothing herein shall require the withdrawal or elimination of any wage increase or other benefits, terms, or conditions of employment which may have been established pursuant to the performance of that contract.

(f) Discriminating against its employees in regard to their hire or tenure of employment in order to encourage membership in Local 713.

(g) Discharging, laying off, or otherwise discriminating against its employees because those employees engaged in activities in support of or on behalf of Local 707, International Brotherhood of Teamsters, AFL–CIO.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 713 as the collective-bargaining representative of its employees at its Melville, New York facility, unless and until that labor organization is certified by the Board as the exclusive representative of such employees.

(b) Make Dwight Melendez, Robert Aprile, Raymond Albanese, Anthony Smith, and Thomas Winkler whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges or layoffs of Dwight Melendez, Robert Aprile, Raymond Albanese, Anthony Smith, and Thomas Winkler, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges or layoffs will not be used against them in any way.

[1] In its answering brief, the Charging Party moves that the Respondent's exceptions and brief in support thereof be stricken in their entirety and disregarded because they failed to meet the requirements of the Board's Rules and Regulations. Although the Respondent's submissions do not strictly conform to the requirements of the Board's Rules, the exceptions, coupled with the brief, are not so deficient as to warrant striking. Accordingly, we deny the Charging Party's motion.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge held that the Respondent was responsible for the conduct of William Massa on the grounds that he was both a supervisor and an agent. We find it unnecessary to pass on the judge's supervisory finding because we agree with the judge that Massa was clearly an agent of the Respondent.

[3] We have modified the recommended Order to correct inadvertent errors and in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Melville, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT direct or urge our employees to sign authorization cards for or otherwise support Local 713, International Brotherhood of Trade Unions (Local 713).

WE WILL NOT threaten our employees with discharge or other reprisals unless they sign authorization cards for or otherwise support Local 713.

WE WILL NOT promise our employees wage increases, medical benefits, or other improvements in their terms and conditions of employment in order to induce them to sign authorization cards for or otherwise support Local 713.

WE WILL NOT recognize or bargain with Local 713 as the exclusive representative of our employees employed at our facility in Melville, New York, unless and until Local 713 is certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT give effect to the collective-bargaining agreement that we executed with Local 713 on May 22, 2000, and any modifications or extensions of that agreement; provided, however, that nothing herein shall require the withdrawal or elimination of any wage increase or other benefits, terms, or conditions of employment which may have been established pursuant to the performance of that contract.

WE WILL NOT discriminate against our employees in regard to their hire or tenure of employment in order to encourage membership in Local 713.

WE WILL NOT discharge, lay off, or otherwise discriminate against our employees because they engaged in activities in support of or on behalf of Local 707, International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 713 as the collective-bargaining representative of our employees at our Melville, New York facility, unless and until that labor organization is certified by the Board as the exclusive representative of such employees.

WE WILL make Dwight Melendez, Robert Aprile, Raymond Albanese, Anthony Smith, and Thomas Winkler whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges or layoffs of Dwight Melendez, Robert Aprile, Raymond Albanese, Anthony Smith, and Thomas Winkler, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the discharges or layoffs will not be used against them in any way.

MEYERS TRANSPORT OF NEW YORK, INC.

Marcia A. Adams, Esq., for the General Counsel.
Denise Forte, Esq. and *Scott Trivella, Esq. (Trivella & Forte LLP)*, of New York, New York, for the Respondent.
Walter Kane, Esq. (Vladeck, Waldman, Elias & Engelhard, PC), of New York, New York, for the Charging Party.
Peter Hasho, of Jamaica, New York, Party to the Contract.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local 707, International Brotherhood of Teamsters, AFL–CIO (Local 707 or the Charging Party), the Regional Director for Region 29, issued a complaint and notice of hearing on September 26, 2000,[1] alleging that Meyers Transport of New York, Inc. (Respondent) violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act). The trial with respect to the allegations raised in the complaint was held before me on February 6, 7, and 8, 2001. Briefs have been filed by the General Counsel, Respondent, and the Charging Party, and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a corporation with its principal office and place of business at 270 Spagnoli Road in Melville, New York, has been engaged in the business of commercial trucking.

During the past year, Respondent purchased and received at its Melville facility goods and materials valued in excess of $50,000 from enterprises within the State of New York, which enterprises in turn, purchased and received such goods and materials directly from points located outside the State of New York. It is admitted and I so find that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that Local 707 and Local 713, International Brotherhood of Trade Unions (Local 713) are and have been labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

Respondent is a commercial trucking company located in Melville, New York, where it handles general freight, such as electronics, boxes, and mail.[2] The Company was started in 1994, and its president and sole shareholder is Michael Meyers. In May 1999, Respondent hired Louis Frisina as general manager. Respondent admits that Frisina and Meyers are supervisors and agents. In July 1999, Respondent hired William Massa. Massa's status is very much in dispute, and was extensively litigated.

B. Status of Massa

According to Massa he was hired as a "leadman." Several employees testified that they considered Massa to be a member of management and or a supervisor. Massa received a salary of $1000 per week, which is the same salary as General Manager Frisina.

Respondent distributed a list of emergency phone numbers to drivers to call for emergencies, including after hours. The cell and home phone numbers of Massa is included on that list as well as the numbers of Frisina and Meyers. Similarly, drivers who worked for Southern Container, one of Respondent's accounts, were given a list of rules to follow in connection with that account. One of the rules instructs employees to contact either Frisina or Massa if they are stuck at a delivery stop for more than a half hour, or if they must leave early or cannot come in on a particular day.

Employees Harry Grota, Vito Scatigno, John Ballou, Dwight Melendez, Raymond Albanese, and Thomas Winkler all furnished testimony concerning Massa's responsibilities, their observations of his work, and various interactions that they had with him. I found their testimony with regard to these matters to be credible, and for the most part was not denied by Massa. To the extent that their testimony is contradicted by Massa and or Frisina, I credit the testimony of the employees.

All of the employees testified that they never saw Massa driving a truck. However, the employees conceded that they spent very little time at Respondent's premises, so that they could not be certain that he didn't drive a truck as Massa testified for portions of the day.

They also testified credibly that Massa had an office in one of the trailers at the Melville premises. Both Massa and Frisina contend that there was an office there, that Massa sometimes uses, but it was not his office, and that it was a "common" office used frequently by others. I credit the employees' versions with respect to this issue, particularly since neither Massa nor Frisina furnished specific testimony as to who else used the office on a regular basis, other than a driver or secretary waiting to make a phone call.

Scatigno was hired on March 6, 2000, by Lou Frisina. He was told by various other employees that Massa was a part owner, a supervisor, a good friend of Meyers, and or a salesman. Massa would on occasion when the dispatcher, Vinnie—was not available, tell Scatigno which truck to take out or where he should be going. Scatigno observed Massa driving around the yard in a Jeep Cherokee, and "coming and going as he pleased."

On one occasion, Scatigno had informed Vinnie that on a particular day while servicing a Southern Container, one of Respondent's accounts that he had to leave early and Vinnie said there will be no problem as long as you tell the people at Southern Container. However, when he informed a Southern Container employee about his intention to leave early, an argument ensued, in part based on a prior relationship that Scatigno had with the individual at a prior job. The Southern Con-

[1] All dates hereinafter are in 2000 unless otherwise indicated.
[2] Respondent also has a yard in Deer Park, New York.

tainer employee called Massa and complained about Scatigno. As Scatigno was returning to Respondent's yard, he received a call over the radio from Massa. Massa said that he heard that Scatigno had a problem at Southern Container. Massa informed Scatigno that he was not allowed to leave early and that Respondent needed that account. He added that he would talk to Scatigno when he returns to the yard.

When Scatigno reached Respondent's premises, he spoke to Massa in Massa's office. Frisina was also present. Scatigno explained his version of the incident, including that he had informed Vinnie of his intent to leave early, as well as his past dispute with the Southern Container employee from another job. Massa then said, "I will not send you back there anymore. You won't have to go back there any longer." Frisina agreed and also said, "I don't think we should send him back there." Thereafter, Scatigno was not assigned to service Southern Container.

On another occasion, Scatigno pulled into a shopping center in Respondent's truck, and was about to buy a pack of cigarettes. However, as he stepped out of the truck, he received a call over the radio from Massa. Massa asked Scatigno, "Vito, is that you in that truck?"[3] Scatigno replied, "[Y]es." Massa then told Scatigno that he was not supposed to be in the lot because he had U.S. Postal Inspectors around. Scatigno protested that the truck does not say "U.S. Mail" on it, and he was allowed to park there, and he was just going for a pack of cigarettes. Massa responded by saying, "We can't allow that. If I were you, I would take the truck back to the yard. I don't want to see you here again." Scatigno complied with Massa's instructions. Scatigno did not receive any written disciplinary reports about the incident, nor was he spoken to about it again by Massa or any other officials of Respondent.

Additionally, when Scatigno had problems with his truck or trailer, such as a flat tire or a door not shutting on the trailer, he would either tell Vinny, Frisina, or Massa. When he would inform Massa, Massa would say, "I'll take care of it."

Albanese was hired by Respondent in August 1999. He was interviewed and hired by Frisina, and at that time he was introduced to Massa by Frisina. Frisina said to Albanese that Massa "handles the drivers," and that Massa would give Albanese a road test. Massa gave Albanese the road test, and, after being fingerprinted and passing a driving test, Frisina told Albanese when to start.

Massa instructed Albanese that "you got a problem, you come to me." Pursuant to this instruction, Albanese, did in fact speak to Massa about various problems that developed on the job. Albanese had a problem with Vinny the dispatcher. Albanese complained to Massa that Vinny was high strung and yelled at Albanese frequently and he didn't like the way Vinny was speaking to him. Massa replied, "I'll take care of it." While Albanese did not know, what if anything Massa did about his complaints, for a period of time thereafter, Vinny calmed down for a while and stopped yelling. Subsequently, Vinny began yelling at Albanese again, but by then he realized it was not personal, learned to live with the problem, and did not complain again to Massa.

On another occasion, Albanese spoke to Massa about a problem with Southern Container. Albanese had an argument with a dispatcher at Southern Container, and told Frisina that he didn't want to be assigned there anymore. Albanese did not recall Frisina's response, but subsequently he was again assigned to Southern Container. However, Albanese called in sick that day, because he didn't want a confrontation. Massa called Albanese and asked what happened. Albanese explained the whole story, as outlined above. Massa told Albanese that he would try to keep him out of Southern Container, and would get him "better work." Thereafter, Albanese was not sent back to Southern Container, but was given other assignments such as Piers or Combined Container.

On several other occasions, Albanese asked to perform some postal work. Massa replied that he would "see what I can do." Shortly after these requests, Albanese began to receive some postal assignments. Albanese would also, on occasion, when the schedule was not posted, ask Massa where he would be working the next day, and Massa would inform him of his assignment.

Also, during his employment by Respondent, Massa was one of three representatives of Respondent, Frisina and Meyers were the others, who authorized Albanese to have repairs done on Respondent's vehicles at Hub, the company that performed repairs on Respondent's equipment. At times Massa would authorize the repairs, without checking with anyone.

Finally, Albanese had an accident and was out of work from October to March. During the last month of his injury, Massa made several calls to Albanese, asking when he was coming back to work, and telling Albanese that Respondent needed him because "its busy."

Melendez was also hired in August 1999. He was also interviewed and hired by Frisina. Shortly thereafter, Melendez was introduced to Massa by Vinny. They shook hands, and Massa told Melendez, "I'm in charge. If you have any problems, come and see me." Melendez observed Massa thereafter frequently in Meyers' office or on the phone in Massa's office. Melendez considered Massa to be a boss and above Frisina in Respondent's hierarchy.

As for specific incidents involving Massa, Melendez was working at Island and Combined Container. Melendez noticed that Island and Combined were renting boxes and trailers from an outside company. He told that to Frisina, and suggested that these companies could rent these items from Respondent. Frisina replied that this was a good idea, and said, "[C]ome and tell Bill." They both immediately went to see Massa, and Melendez made his suggestion. Massa called these customers, and in Melendez presence, said, "[M]y driver says you are renting boxes from an outside company. We can give you a good price." After some negotiations, Respondent made a deal to supply the items to the customers.

Shortly after Melendez started working, Massa observed Melendez driving too fast in the yard. Massa pointed to a sign and said, "[T]his is a five miles an hour zone. Didn't nobody tell you? You've got to obey the rules." He added, "[Y]ou are going to obey the rules, and I can enforce them." On another

[3] Although Scatigno did not see Massa, he believes that Massa must have been in the lot at the time.

occasion, Melendez heard Massa criticize employee John for lateness. Massa told John, "[Y]ou are going to be out of here if you keep coming late like this." Shortly thereafter, John was terminated.

Anthony Smith was hired in November 1999. He had known Massa from a previous job. Smith saw an ad in the paper for a job with Respondent. When Smith called up Respondent he spoke to a Lee Brown another employee who also knew Massa from another job. Brown told Smith to come down and fill out an application and told him that Massa was working at Respondent.

When Smith arrived, a secretary gave him an application to fill out. After Smith filled it out, she called Massa out from his office. Massa asked how Smith was doing and where had he been working. After Smith answered, Massa told him what Respondent offered with respect to salary, vacation, and medical benefits. They also discussed that job consisted of delivering trailers, picking up trailers at the post office, and dropping them off in New Jersey and other delivery work. He also told Smith that he would need to pass a road test and a drug test. Massa then brought Smith to Vinny the dispatcher, and instructed Vinny to give Smith a road test. Smith took the test, and Vinny told Massa that Smith had passed.

At that point, Massa took Smith in to see Frisina, and Massa introduced Smith as "our new employee who is starting next week." Frisina then filled out some additional paperwork, and set up the drug test and fingerprinting for Smith. Later on that week, Smith was called, by whom he did not recall, and told to come to work.

Smith had a problem with his tractor, and the drive shaft fell out. He reported the incident to Vinny, who dispatched another truck to hook up to the trailer and the other truck was towed. A few days later, Smith was spoken to by Massa about the incident. Massa instructed Smith to be careful, and told him that they, meaning Hub, the owner of the tractor, put it down as driver's neglect.

On another occasion, Massa called Smith on the radio and told him to stop sleeping on the side of the road. However, it does not appear that Smith received any written warning or other discipline for this conduct.

Thomas Winkler began his employment with Respondent in August 1999. He was hired by Frisina. On that day, Winkler was introduced to Massa, who said to him, "[W]elcome to Meyers." Massa did not tell Winkler what his position was at Respondent, but Winkler believed him to be part of management.

This was because Massa had his own office, and various other incidents that occurred. Thus, on one occasion, Massa informed Winkler that someone from Eastern Warehouse had called Massa, and said that Winkler was doing a great job. On another occasion, Winkler asked Frisina for a raise. Frisina directed Winkler to go see Massa. Winkler then asked Massa for a raise, pointing out among other things the compliment that he had received from Eastern Warehouse. Massa replied that he would get back to Winkler. However, Winkler never received a raise, and never spoke to Massa about his request again. Additionally, several times Massa asked Winkler to work overtime, either on a Saturday or later on a particular day.

Winkler also dealt with Massa a number of times concerning repairs or other problems with Respondent's trucks. Thus, while he was at Eastern Warehouse doing a pickup, Massa called him on the radio. Massa asked Winkler if the vehicle had a temporary plate on it. Winkler said yes. Massa told Winkler that "it's no good," and that he was going to have to bring down a new plate for the trailer. Thus, Winkler waited for Massa to bring down the new license plate.

There was another incident, when Winkler was taking a load to New Jersey; the truck started to overheat. He reported the problem to Vinny, who in turn switched him over to Massa. Winkler explained the problem and asked Massa what he should do. Massa asked how far away he was from the stop. Winkler replied that he didn't want to blow the engine, and if it was his call, he wouldn't drive it, because a motor is a lot of money. Massa instructed Winkler to go ahead and drive the tractor. Winkler did so, and the motor blew.

Another time, Winkler was in the drivers' room. He informed Massa that his headlight switch was burnt out. Massa, without checking with anyone, told Winkler to go to Hub and get the problem fixed. Winkler also received direct authorization from Massa to go to Hub and fix another mechanical failure on his tractor.

Finally, Winkler also dealt with Massa when he had an accident, was stopped by the police, and there was no paperwork in the tractor. Again, he called Vinny, who in turn put Winkler in touch with Massa. The tractor was not one of Respondent's vehicles, but a rented vehicle, which Winkler explained did not have any paperwork in it. Massa told Winkler where to look for the paperwork. Winkler replied that he already looked there. Massa ordered him to look harder. He looked again, but still could not find the paperwork. Finally, the police agreed to let Winkler continue on, and that Respondent would be allowed to fax in copies of the insurance card and registration. Winkler had no further dealings with Massa concerning this incident.

Harry Grota was hired by Respondent in March. Grota was formerly employed by a company that used to perform trucking work for Southern Container, an account that Respondent acquired. Grota heard that Respondent was hiring and he was recommended by another driver to Frisina. Grota met with Frisina, was given a road test, and they discussed wages and benefits. Frisina told him that he would be hired and wanted Grota to start right away. However, Grota wanted to finish out the week with his prior employer. Frisina gave him an application to fill out and told him to fill it out, and bring it back when he was ready to start.

On the Saturday before he started work for Respondent, Grota went to Respondent's facility. He asked to see Frisina, but Frisina was not there. The secretary suggested that he could speak to Massa. Although Grota did not know for sure who Massa was at the time, he had been previously informed by a driver named Mike who used to work at Respondent that Massa was "second in command," and a "boss" at Respondent. Thus he agreed to speak to Massa. Massa came out of his office, and asked Grota to come into the office and close the door. Massa introduced himself, but did not tell Grota his position with Respondent. Grota did not ask, but assumed Massa to be a man in authority. Grota told Massa of his extensive experience

in the industry, including 17 years at Texaco, as well as experience with Southern Container. He also told Massa that he wasn't looking for a lot of hours, only 8 to 10 a day. Massa replied, "I have no problem with that." Massa explained Respondent's benefits and Grota brought up the subject of wages. In that regard, Frisina had initially told Grota that Respondent starts at $13 per hour, and after 90 days, goes to $15 per hour. Grota had not complained to Frisina about that at the time of his initial interview, but during this conversation with Massa decided to make a pitch to shorten the time period. Thus, he said to Massa that he had already been doing Southern Container work for a long time, he knew it well, and he was not going to learn to drive a truck much better. Therefore, he asked if Respondent could shorten the 3-month period before he gets his raise. Massa replied that Grota should see him about it in a month and a half.

Pursuant to Massa's instructions, a month and a half later Grota tried to see Massa about the matter. He asked the secretary if Massa was in. She suggested that he check in Massa's office, but he was not there. The secretary told Grota that Massa was in a meeting in the other trailer. Grota cut through Massa's office, in order to go to the other trailer where Massa was in the meeting. Massa came out of that office where he was meeting with Mike Meyers. Grota said to Massa, "I came to see you." Massa became angry, and told Grota, "I don't want you going through my office. That's not a short cut. If you want to see me, you can go around." Massa then instructed Grota to go around to the other trailer and wait for Massa to finish his meeting. After waiting for 20 minutes, Massa called the secretary who relayed a message that Massa was too busy to see Grota that day and to see Massa next week.

A week later, Grota again asked the secretary to see Massa. He was again in a meeting. The secretary called Massa in the meeting, and reported back to Grota that Massa was busy in a meeting and could not see him that day. Grota never did speak to Massa again about the raise and did not receive a raise until his 3-month period had expired.

Massa testified that he was hired by Respondent as a "leadman" in July 1999. According to Massa, his primary responsibilities in that capacity was to act as fill-in driver, to drop off and pick up trucks to Hub for repairs, and move trucks and trailers around in the yard. He claims that he spent 20 hours a week driving a truck. Massa denies that he had the authority to hire, fire, suspend, reprimand, or give raises.

However, Massa admits that he acted as sort of a "buffer zone" between Respondent and employees. In that connection, he would transmit requests or complaints that employees made to him to Frisina, as well as transmit instructions and or complaints from management to employees. He testified to some examples of his conduct in this regard. They include receiving information or complaints from drivers about a breakdown or a repair that might be needed. In such a case, Massa contends he would collect the information, and call either Frisina or Meyers for a decision on what needs to be done. He would then transmit the instructions to the driver.

He also recalled speaking to drivers about complaints from customers about their performance, but asserts that in these cases he would be do so upon instructions from Frisina or Meyers to so inform the employee of what they had done wrong. Massa also testified that he was told by Meyers to call Smith and inform him that when the drive shift on his truck fell out it was declared by Hub to be "drivers neglect." Hub was trying to bill Respondent for the repairs, so Meyers wanted Massa to so inform Smith and to tell him, which he did to "be careful with the trucks."

Massa also denied having the authority to switch employee routes, but admits that if an employee made a request for a route change, he would transmit such a request to Frisina or Meyers, and or transmit their decision to the employee.[4]

Although he admits transmitting to Frisina employee complaints about particular runs or about customers, he denies transmitting employee requests to him for raises to Frisina or Meyers, because according to Massa, "I felt it wasn't my position to go to management and talk to them about it."[5]

Massa also admits that when drivers came to him with complaints about various matters such as that they were unhappy with a certain run, he would tell the employees, "I'll see what I and do for you?" He would then try to help employees get off the run, by transmitting the request to Frisina, and recommending that the run be switched. According to Massa, in such cases, sometimes Frisina would make the switch, and sometimes he would not.

Frisina testified that both he and Meyers knew Massa from other jobs when they hired him. According to Frisina, Massa was brought in "to make the business go forward." Massa filled in for drivers who were out, moved trucks around in the yard, and sent out new vehicles if a truck was down. Massa also introduced Respondent to certain people. These introductions led to new business.

Frisina also admitted that Massa would transmit to him complaints or grievances from the men, and at times give his opinion about the matter. However, accordingly it was always Frisina's ultimate decision on the particular issue. Thus, Frisina asserts that drivers would complain to Massa about problems with their truck or about needed repairs. In such cases, Frisina would take care of the matter by either calling Hub himself or instructing Vinny to do so.

Frisina also testified that Massa did not have a private office, but that office in question was by Massa for his sales calls, and other matters. He also contends that the office is used by others who wish to make private calls, such as Vinny or other employees, and even at times by Frisina himself.

C. The Organizational Campaign for Local 707

In late April and early May Smith began discussing the possibility of Local 707 becoming the bargaining representative for Respondent's employees with several employees including Melendez, Albanese, and Aprile. Most of these discussions took place off the premises, at various stops on Respondent's

[4] Thus, Massa did not recall a conversation with Scatigno about not going to Southern Container. However, he admits that he might have been instructed to inform Scatigno of such a decision. As noted above, I have credited Scatigno's version of their discussion, wherein Massa said to him, "I won't send you back there anymore."

[5] Interestingly, Frisina contradicts Massa on this point, and testified that Massa did transmit Winkler's request for a raise to him.

route, or delicatessens and restaurants, but there were a few such conversations at the Melville facility, in the driver's room, the yard, or the parking lot.

In late April, Smith contacted Local 707, and was put in touch with Lou Capinello, who gave Smith authorization cards to distribute. Smith thereafter distributed cards to approximately 10–15 employees, including Albanese, Melendez, and Aprile. He also gave these employees cards to distribute to other employees, which each of them did during early May. Smith and Albanese signed their cards on May 3, and Albanese signed his card on May 2. All of the discussions about and the solicitations of authorization cards took place away from Respondent's premises.

On or about May 6, Capinello informed Smith that he had set up a meeting for employees with union representatives on Saturday, May 13, at the Knights of Columbus Hall. Smith, over the next week, contacted a number of employees to inform them about the meeting. These employees included Melendez, Aprile, and Winkler.[6] The other three employees also discussed the meeting with other employees. However, all of these discussions about the meeting took place away from Respondent's facility.

On Saturday, May 13, the meeting was held as scheduled. It began at 10 a.m., and lasted until 12 noon. Present were Capinello and two other Local 707 representatives. Initially, the employees present were Smith, Aprile, Melendez, Winkler, Albanese, and John Ballou. During the course of the meeting employee John Ponce arrived. When Ponce arrived, Smith testified that he shook his head and his "stomach hit the ground," because he did not trust Ponce, and thought he was "more towards the company, kiss butt." In fact, Smith had made it a point not to discuss Local 707 with Ponce and had not informed Ponce about the meeting. Smith in fact asked Ponce how he found out about meeting, and Ponce replied that he heard about it from "some guy." Smith asked who it was, and Ponce answered that he did not know, but that he was talking to a couple of drivers and he heard about the meeting. Ponce then sat down next to Smith, and asked Smith to identify the names of the employees present. After Smith identified the others present, Ponce stayed for a few minutes and said that he had to go to the bank and cash his check, but he would be back. Ponce never returned.

During the course of the meeting, Smith gave Capinello the signed cards that he had obtained, including the cards of Albanese and Melendez. Ballou also signed a Local 707 card prior to the meeting, although the record is not clear where his card was given to Local 707. Aprile signed his card for Local 707 at the May 13 meeting, and gave it in to Capinello. Winkler did not sign a Local 707 card either at or prior to the meeting. He did eventually sign a Local 707 card, but not until May 18.

Sometime during the week of May 15, after employees were laid off, Smith encountered Ponce across from Levitz, one of Respondent's stops. Smith asked Ponce if he would sign a card for Local 707. Ponce replied that he did not want to get involved because he was putting in for another job. Smith replied since he was leaving anyway, can he please sign the Local 707 card. Ponce said no, he was putting in for a job with the Long Island Railroad.

D. The Layoff

Normally, Respondent posts a schedule at its premises of where drivers are to assign for the next working day, between 3 a.m. and 6 p.m. of the prior working day.[7]

On Friday, May 12, in the late afternoon, Melendez looked at the schedule for Monday, May 15, and noticed that the word "off" was next to his name. He asked Vinny why he was off? Vinny replied, "I don't know. You've got to see Lou." Melendez, as noted, was hired by Respondent in August 1999. Prior to the layoff Melendez had been regularly assigned to truck 6, which serviced Combined Island Container, had worked 65 hours the prior week and averaged 60 hours per week.

Albanese, who was also hired by Respondent in August 1999, as of May 12, was doing work primarily for U.S. Postal Service. He, as well as most other employees of Respondent were averaging, 60 or more hours a week.

Albanese got into an accident and was out of work from the end of October 1999 until May 2000. On Friday, March 12, in the late afternoon Albanese was told by Vinny to call on Monday to see if there was work, because it might to slow. Albanese did not see a list posted when he was there on May 12.

Smith, who was hired by Respondent in November 1999, worked for various accounts of Respondent including U.S. Postal primarily, but occasionally Southern Container or Combined Island. On Friday, May 12, he was delivering flowers. For that week Smith worked 60 hours, and for the previous week, he put in 55–60 hours.

At around 3 p.m. on May 12, Vinny contacted Smith and told him that he had to work on Saturday, May 13. Smith replied that he had plans with his wife and had already worked 60 hours. Shortly thereafter, Smith received a call from Massa, who instructed him that since he can't work on Saturday, to hand in his radio when he gets back to the premises. Smith made no response.

Later on in the day, Smith received a call from Melendez who informed him that some guys had been told there is no work for them on Monday and asked Smith to try to find out what was going on. Smith then called Vinny and asked what was going on for Monday. Vinny replied that it was "slow," and instructed Smith to call Frisina on Monday. Instead, Smith contacted Frisina immediately, who told him Respondent was slow and to call on Monday to see what was going on. At around 6 p.m., Smith called Massa and asked why he had to hand in his radio. Massa answered that "it's slowing down, there's nothing going on."

Winkler, who was also first employed by Respondent in August 1999, worked on various accounts including Eastern Warehouse, Phoenix Warehouse, U.S. Postal (40 percent of his

[6] When Smith discussed the meeting with Winkler, at first Winkler said, "[L]et me think about it." Then after thinking about it, Winkler got back to Smith and said that he would attend.

[7] Some employees however will call on to find out their assignment, either that day or on the day of work.

time), and Southern Container, only when someone was sick or Respondent needed a replacement. During the week ending May 12, Winkler worked 60 hours for Respondent. On May 12, at 4 p.m., Winkler received a call from Massa over the radio; Massa asked Winkler if he could work on Saturday, May 13, doing U.S. Postal work. Winkler said no, that he had other things to do. Later on that night, Massa called Winkler again and asked him to do an extra run that same evening, and that assignment Winkler performed. Massa said nothing about layoffs during these conversations, and when Winkler went to the facility after his extra run, it was after 7 p.m., and he did not bother to see if a schedule was posted for work on Monday. In fact, it was Winkler's custom to call Respondent the day before work to find out his assignment. Accordingly, on Sunday, May 14, Winkler called Vinny. Vinny informed Winkler that he was off on Monday. Winkler asked why? Vinny answered, "[I]t's slow," and suggested that Winkler call Frisina on Monday.

On Monday, May 15, Albanese reported to Respondent's facility, and was given an assignment. Smith and Melendez asked Vine what was going on? Vinny answered, "[I]t was slow," and to speak to Frisina. Later on that day, Melendez did speak to Frisina, who informed Melendez that work was "slow." Melendez replied that even if work is slow, he has seniority over some people who were working. Frisina did not answer or dispute that assertion, and merely told Melendez that is slow, he wasn't working and "to call tomorrow."

Winkler also went to Respondent's premises on Monday, and was told by both Vinny, and later on to Frisina, that work was slow. Frisina told Winkler that Respondent had let a lot of driver's go. In that regard both Winkler and Smith looked at the work schedule on Monday, and noticed that from five–seven people had "off" next to their names, primarily the employees who attended the Union meeting on May 13.[8]

While on his route on May 12, Albanese was stopped for an inspection at the Department of Transportation. After Albanese reported this to Vinny, Mike Meyers arrived. Albanese asked if he was going to be laid off? Meyers replied yes, work was slow and Respondent had lost, "a couple of things." Albanese asked why he was being laid off when Respondent was keeping guys that were hired after him. Meyers responded, "[T]hey do different things." Albanese then reported back to the office, where Vinny informed Albanese that he wasn't supposed to have worked that day and that he was laid off because work was "slow."

Aprile was hired by Respondent in March 2000. From the time of his hire, he worked primarily for Respondent's account, Southern Container.[9] Indeed, as of April 10, Respondent sent a memo detailing procedures for employees working at Southern Container, which included the names of nine employees, including Aprile. These employees are instructed to report directly to Southern Container locations either in Deer Park or Happauge.

Monday, May 15, was Aprile's scheduled day off. He called Frisina on that afternoon to find out about work for the next day, May 16. Frisina told Aprile that he wasn't scheduled to work because things were "slow." Frisina added that Respondent had "lost a couple of accounts."

Several of Respondent's employees were skeptical of Respondent's claim that work was "slow," particularly since they all had worked overtime hours during the prior weeks. Thus, Aprile went to Respondent's facility to speak to Frisina and Massa (who Aprile characterized as Frisina's boss). Aprile asked Frisina why he was being laid off. Again Frisina replied that it was slow. Aprile responded that he was a permanent driver for Southern Container, and had been requested by Southern Container, and other drivers working at Southern Container who were hired after Aprile, were still working.[10] Frisina replied that drivers with more seniority than Aprile were laid off also. Frisina added that Respondent "just went down the list and chose names to decide who was going to be laid off." Aprile replied that he knew that Frisina had someone driving his truck already, named Peter who had been a problem employee in the past. Frisina reported that things were slow and he did not have to give any more reason than that. Aprile then asked if the layoff has anything to do with the Union. Frisina answered, "[W]hat Union. I know nothing about a Union." Aprile responded that it was funny "how all the guys who had anything to do with the Union, we all have lost our jobs."[11]

On Wednesday, May 17, Melendez went over to Combined Island Container where he had been assigned to see if there was work. He spoke to foremen at both companies and was told there was "work." Melendez then went to Respondent and confronted Frisina. He told Frisina that he had been over at Combined Island and there was work. He added that he had

[8] Smith recalled that Haywood Jennings, who was not at the meeting, had "off" next to his name.

[9] Aprile had previously been employed by Lily Transportation, the contractor that serviced Southern Container before Respondent acquired the account.

[10] It is not clear on what basis Aprile made this statement, since he was hired on March 13, 2000. He may have believed that his experience at *Lily Transportation*, the prior contractor for Southern Container should have been counted. Nonetheless, Respondent's records reveal that two employees working at Southern Container, Bob Mack and Harry Grota, were hired by Respondent on March 20, 2000, a week after Aprile.

[11] My findings with respect to Aprile's conversations with Frisina are based in part on Aprile's pretrial affidavit. While Aprile identified his signature on the affidavit, and he admitted that he furnished it to the General Counsel, he testified that he either did not remember or denied certain portions of the affidavit. However, Aprile was a most reluctant witness. He was subpoenaed by the General Counsel, and at the start of his testimony asked to be excused and not be compelled to testify. He has since the layoff been reinstated by Respondent. I conclude that Aprile having been recalled by Respondent, and believing that he was laid off for his union activities, was not anxious to antagonize Respondent in this proceeding by furnishing testimony adverse to Respondent's position. I therefore find that the affidavit reflects a more accurate recitation of his conversations with Frisina, than his contrived lack of recollection at trial, and shall credit the same. The Board has consistently permitted the use of affidavits as substantive evidence in similar circumstances. *Three Sisters Sportswear Co*., 312 NLRB 853, 865 (1993), enfd. mem. 55 F.3d 684 (D.C. Cir. 1995); *Yaohan U.S.A. Co*., 319 NLRB 424, 426 (1995); *St. John's Trucking*, 303 NLRB 723 fn. 3 (1991); *New Life Bakery*, 301 NLRB 421, 426 (1991); *Snaider Syrup Corp*., 220 NLRB 238 fn. 1 (1975); *Starlite Mfg. Co*., 172 NLRB 68, 72 (1968).

seniority and someone else was filling in for him with less seniority.[12] Frisina did not respond to Melendez' complaint about seniority, and reiterated that "it's slow" and added, "[Y]ou probably won't be working for a while." On Friday, May 19, Melendez went to Respondent's facility to turn in his keys and his radio pursuant to Frisina's instructions, and to pick up his paycheck. Melendez encountered Meyers, and asked Meyers why he wasn't working? Melendez added that it wasn't slow at Combined, and criticized Respondent for bumping other guys around and laying him off out of seniority. Meyers replied, "[Y]ou know, I have to check into it." At that moment, Massa came over and ordered Melendez to "go in and turn your radio and everything else." Massa then started talking to Meyers and Melendez left.

Albanese also returned to Respondent's facility on Tuesday, May 16, to turn in his keys. Frisina told him at that time, "[Y]ou're done, there's nothing for you." Later on that week, Albanese went back to the facility to talk to some of the drivers. At that time, he observed one employee driving a truck and doing postal work, who had been employed by Respondent for only 2 or 3 weeks. Albanese also saw an ad in Newsday, a newspaper in Long Island, during that week, wherein Respondent was advertising to hire drivers.

In late June, Respondent offered Aprile, Albanese, Melendez, and Smith reemployment. Aprile, Albanese, and Melendez accepted the offers and returned to work. Smith was sent a written offer of reinstatement by certified mail. However, Smith never received the letter, since he did not go to the post office. When Winkler heard that other drivers had been reinstated, he called Frisina and asked when would he be returning. Frisina answered that Respondent had not called Winkler back because of the accidents that he had. Winkler replied that the accidents were not his fault. Sometime in late July, Frisina spoke to Winkler, and told him to report to work. Winkler accepted Respondent's offer, and returned to work.

Frisina was Respondent's only witness who testified concerning the decision of Respondent to lay off employees. According to Frisina, when he was hired in the summer of 1999, Respondent was a small operation with approximately 12–15 trucks. He further asserted that by the end of 1999 business had substantially increased, and it had 35–40 trucks. Early in 2000, Frisina further asserted that Respondent began to perform certain work for the U.S. Post Office known as "proxy" work. This work involved a company call ADP which would produce and collate proxy documents, which Respondent would transport to various post office facilities. Frisina's recollection as to when this "proxy season" ends changed several times over the course of his testimony. When testifying initially on direct, Frisina asserted that the season ends in late April or early May, and that Respondent received notification by letter dated May 12 from the post office that their work would be substantially reduced due to the proxy season. Thus is a result of this letter, Frisina testified that he and Meyers decided that Respondent needed to lay off some employees as of May 15. He also testified that he and Meyers made the decision to lay off employees on Friday, May 12. More specifically when asked why the decision was made Frisina testified, "[R]eduction in work, we slowed down. There was a period where we slowed down a little bit."

On cross-examination, Frisina was asked again to explain Respondent's decision. At that point, he testified that Respondent was tremendously busy during the Christmas season, which carries into January through early March. Then he testified, "March obviously ends our proxy season." Then Frisina explained that everything drops off "for the next couple of months."

Later on in his testimony, Respondent asked a clearly leading question to Frisina, "If you know, May as a point in the calendar year, that would be the end of the proxy season, correct?" Frisina responded, "I would assume, or prior to that. I have no idea because I don't know what Mike was doing."

Frisina also charged his prior testimony concerning when and how Respondent made the decision to lay off employees. As noted initially, he attributed the decision to the letter from the Post Office, dated May 12. This letter from Michael Simpson of the Postal Service to Mike Meyers, reflects that as of May 15, 2000, due to the culmination of the proxy season, the post office's need for extra equipment will "drop drastically," and "we will not be calling on your company for as much extra service." When asked further about this letter Frisina testified he "assumed" that Meyers received it on May 12. When it was pointed out that the letter reflects that it was received by fax on June 14, 2000, Frisina testified that "I'm sure the original was sent over at the time." When asked when he first saw it, Frisina indicated that he didn't know about it until several days later, but adds that he knew that Meyers was speaking to Simpson and was informed that business was slowing down. Thus, he claims that the decision was made before Respondent received the letter, and Frisina testified, "I assume he [Meyers] figured if anybody's going to ask why I'm getting laid off, I guess he'd have something in documentation to show anybody, that they slowed down."[13] Frisina further testified that he and Meyers began discussing the possibility of layoffs on or about May 5, when Meyers allegedly informed Frisina that business was slowing down from the post office, and that layoffs would be necessary. According to Frisina, Meyers told him that Respondent was coming out of the proxy season, which runs 2–3 months after the Christmas rush. At that point, Respondent would not need a dozen or so drivers, because work would be slow.

After several further discussions, between Frisina and Meyers, Frisina contends that on May 10, Respondent decided to lay off eight or nine employees, and made the selection of whom to lay off. In that regard, Frisina testified that Respondent did not consider seniority as a factor, and made its decision based on a review of the performance of all its drivers. Frisina conceded that Respondent continued to run an ad in Newsday as well as another publication, Pennysavers, for employees during the period of the layoff, and that it continued to accept applications and interview employees during this period.

[12] Melendez had seen a list of drivers at Combined Island, and noticed that at least one of the drivers had less seniority than Melendez.

[13] The record reflects that Local 707 filed its charge of May 17, and the charge letter was sent out May 22.

However, Frisina insists that no employees were hired during the period of the layoff, and that he recalled the employees when post office business picked up and Respondent acquired some new accounts.

As for why Respondent selected the five discriminatees for layoff, Frisina asserts that he laid off Albanese, because Albanese had informed Respondent that he did not want to work for Southern Container. As for Melendez, Aprile, and Smith, Frisina testified that he received complaints from representatives of Southern Container about the conduct of these employees, wherein they allegedly asked that these employees not be sent back there. These alleged complaints ranged from too slow, not calling in, and getting lost (Aprile and Melendez), and getting caught sleeping on the road (Smith).

However, Frisina admits that Respondent never issued any written or oral warnings to any of these employees about these alleged complaints.[14] Moreover, Frisina did not detail when these complaints were made or who specifically made them or how often Respondent received such complaints about these employees.

As for Winkler, Frisina initially testified that Winkler was selected for layoff because he had two accidents, and because he blew out two engines on his truck. According to Frisina, he was informed by representatives from Hub that the blown engines were due to lack of water and oil which Frisina believed was caused by Winkler's failure to make his pretrial inspection.

On further examination, however, Frisina changed his testimony and included Winkler along with Aprile, Melendez, Albanese, and Smith as employees whom either refused to work for Southern Container or Southern Container had asked that these employees not be sent to work there.

Winkler admitted that he had two accidents during the year 2000, but claims that neither accident was his fault, and that Respondent had accepted this fact. Indeed, Frisina conceded that Winkler was not found to be at fault in either accident.

As for the blown engines, as related above, Winkler credibly testified (without contradiction from Massa), that he told Massa that his truck was overheating, and recommended that he not complete his run and get the truck repaired. However, Massa ordered him to complete the delivery, and the engine blew as a result.

Frisina was asked about prior layoffs, and more specifically, whether or not Respondent laid off employees in May 1999, when the proxy season ended. Frisina was not employed by Respondent in May 1999, so he could not be certain of what Respondent did at that time or whether it laid off employees in May 1999 or anytime prior thereto. However, Frisina asserts that he believes that Respondent did not have the proxy season business in early 1999. Thus, while Respondent did have post office business in early 1999, Frisina did not believe, although he was not certain, that Respondent had that phase of the business, since Respondent had only 15 trucks in May 1999 and could not have handled the proxy season business with so few trucks.

Meyers, who of course could have given definitive testimony about Respondent's past practice, its prior layoffs if any, as well as testimony concerning the necessity for Respondent to lay off employees did not testify.

Testimony was provided, however, by employee Melendez that during Christmas, when work was slow because one of Respondent's customers closed for the week, Respondent asked employees to voluntarily take time off. Some employees agreed to this "voluntary" layoff. This testimony was not denied by Frisina or Massa and is therefore credited.

Frisina testified that in addition to the five discriminatees, Respondent included three or four other employees in the layoff as of May 12. One was Haywood Jennings, who Frisina testified was included, because he had gone on a routine delivery and disappeared for 3-1/2 days without calling either Respondent or his family. Moreover, Frisina asserts that Respondent had prior incidents with him also, "but this was major as far as I was concerned."

Walter Bryson was also included according to Frisina because he was in an accident, wherein he "wrecked a truck," by hitting a low bridge at an underpass, which Frisina described as 100-percent driver's neglect.

Frisina also contends that he included Anthony Wilson in the group to be laid off. Wilson was, according, to Frisina not doing his job right and taking too much time to do something that is routine.

Frisina testified that he also laid off a ninth person at the time, but he could not recall the name or the reason for that person's selection. When asked for the reason this employee was selected, Frisina responded, "[P]erformance, or it could have been a recent hire." When asked if that latter response meant "recent hire" was a factor, Frisina replied, "[N]ot necessarily, I had no seniority list. But he was just somebody that obviously performance wise, we based on performance so obviously he must fit into that category."

Frisina also testified as noted that Respondent offered jobs to Albanese, Smith, Aprile, and Melendez in June, when work picked up. As also noted, he did not recall that Winkler's reinstatement was delayed because of his accidents. In that regard, a termination form appeared in Winkler's file, dated May 17, which reflects that Winkler was terminated on that date because of "accidents." According to Frisina, this form, which was never given to Winkler, was in the file only because Meyers wanted some documentation for the insurance company, to show that Respondent was taking action because of the accidents.

Frisina concedes that Respondent did not offer jobs to Jennings, Bryson, Wilson, or the unnamed ninth employee. As for Jennings, Frisina explained that he did not offer Jennings his job back, "because his was a blatant order for dismissal at that point." He gave no explanation for not offering recall to the other three employees, other than his testimony that Bryson had "wrecked a trailer."

The number of employees employed by Respondent on or about May 12 is unclear from the record. Testimony was received from various witnesses that Respondent employed 55 employees, but it is not clear if this testimony covers before or after the layoff. The General Counsel introduced an exhibit of

[14] Smith did testify that he was reprimanded by Massa for sleeping on the road. However, he was not warned that his job was in jeopardy because of this incident.

Respondent's payroll records for the week of May 19. However, no testimony was adduced explaining the exhibit, which was admitted into evidence as Respondent's payroll submitted during the investigation. The document consists of nearly 80 names from a computer printout. A large X was placed through many of these names, which appears to reflect that these employees were either terminated by Respondent prior to the week of May 19, or were not in the unit. (Frisina, Massa, Mary Froelich, Respondent's secretary, and Vincent Digiolano, dispatcher.) Notably while Albanese, Smith, Melendez, Jennings, Bryson, and Wilson had Xs through their names, as well as the words "terminated" next to status, Aprile and Albanese are listed as active employees, without an X. This is explainable by the fact that Albanese did work on Monday, May 15, for one route, and Aprile's regular day off was on May 15, so wasn't laid off until May 16.

Accordingly, it appears that the number of Respondent's employees as of May 12 should include six of the employees laid off. (Melendez, Smith, Winkler, Jennings, Bryson, and Wilson.) Since the list contains 54 names, I conclude that as of May 12, Respondent employed 60 employees.

Respondent's records also reveals that during March, it hired nine employees,[15] in April, Respondent hired eight employees, and on May 1, it hired one.[16]

Of this group of 18 employees, 15 of them were not laid off on May 15 or 16 when the discriminatees were laid off by Respondent.[17]

The records reveals that nine of Respondent's employees were assigned regularly to Southern Container, including Aprile, and Mack and Grota who were not laid off, but had less seniority than Aprile.

E. The Recognition of Local 713

On Tuesday, May 16, Massa obtained signed authorization cards, medical authorizations, and dues-deduction authorizations, from 28 of Respondent's employees on behalf of Local 713. According to Massa, he had been a member of Local 713 at another job, and he obtained the cards from Peter Hasho, president of Local 713 over the prior weekend.

Employees Ballou and Scatigno furnished testimony concerning the circumstances of the card solicitation. They credibly testified that Dante Russo, Respondent's assistant dispatcher, informed them that Massa wanted to see them in Massa's office. There were groups of drivers in the driver's room at the time, and each driver was called into the office, one at time. After speaking with Massa, the employee was told to leave through a side door, and the next employee was called in.

Massa handed the Local 713 card, as well as the other forms to Ballou and Scatigno, and requested that they sign the forms. Ballou asked how signing these forms would affect pay increases. Massa replied that there would be pay increases from time to time. Ballou asked if he could think about it and bring it back the following day. Massa replied, "[N]o, you have to leave it today." Ballou then filled out and signed the cards and forms and returned them to Massa.

Scatigno was handed the cards and other forms for Local 713, and was told, "I need you to sign this paper work." Scatigno asked, "[W]hat is that for?" Massa replied, "[W]ell, its for our Local. It's 713." Scatigno inquired, "[W]hat happens if I don't sign it." Massa responded, "[W]ell, basically, you are not going to have a job here." Scatigno asked again, "[A]re you telling me that I have to sign this in order for me to have a job." Massa answered, "[Y]es." Massa also told Scatigno that if he signed the card the employees would receive wage increases and medical benefits. Scatigno signed his card and the other forms and returned them to Massa. After the meeting ended, Scatigno was told by about dozen other employees that Massa had also told them during their meetings with Massa, that Massa had threatened their jobs if they did not sign Local 713 cards.

I credit the testimony of Ballou and Scatigno as to their conversations with Massa on May 16, concerning the Local 713's cards. Massa admits telling employees about medical benefits and does not deny mentioning wage increases. Massa does deny threatening any employees with loss of their job if they did not sign cards, but I credit Scatigno's testimony in this regard. I note that Scatigno is a current employee of Respondent, and not a discriminatee in the instant matter. Therefore, his testimony where it is adverse to his employer is considered to be against his self-interest and therefore more worthy of belief. *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *Molded Accoustical Products*, 280 NLRB 1394, 1398 (1986); *K-Mart Corp.*, 268 NLRB 246, 250 (1983); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962).

Additionally, I credit the testimony of Scatigno that a dozen other employees told him that Massa had threatened them with job loss if they did not sign cards for Local 713, and also find, that in fact, Massa did make such statements to these other employees. While this testimony is hearsay, it is well settled that if no objection is made to the introduction of hearsay testimony, the objection is waived and the evidence may be relied upon. *Iron Workers Local 46*, 320 NLRB 982 fn. 1 (1996); *Teamsters Local 705 (Pennsylvania Truck Lines)*, 314 NLRB

[15] The nine employees are:

Anthony Wilson	3/6/00
Vito Scatigno	3/6/00
George Russo	3/13/00
Raymond Hunt	3/13/00
Robert Aprile	3/13/00
Robert Mack	3/20/00
John Ballou	3/20/00
Harry Grota	3/20/00
Harvey Smowden	3/20/00

[16] The nine employees are:

Charles Chang	4/1/00
James Johnson	4/3/00
Joseph Cusimano	4/3/00
James Felton	4/3/00
Steven Schwally	4/10/00
William Brown	4/10/00
David Marraro	4/10/00
Joseph Walters	4/17/00
John Norman	5/1/00

[17] Employees Scatigno, Russo, Hunt, Mack, Ballou, Grota, Snowden, Chang, Brown, Marraro, Walters, Norman, Schwally, Felton, and Cusimano.

95, 98 fn. 4 (1994); *Livermore Joe's Inc*., 285 NLRB 169 fn. 3 (1987).[18]

Moreover, even if objection had been made to the testimony, the Board has long held that it will admit hearsay testimony if "rationally probative in force and if corroborated by something more than the slightest amount of other evidence. *Dauman Pallet, Inc*., 314 NLRB 185, 186 (1994); *RJR Communications*, 248 NLRB 920, 921 (1980); *Iron Workers Local 46*, supra, *Livermore Joe's*, supra; *Pennsylvania Truck*, supra, see also *Sheet Metal Workers Local 28 (Borella Bros.)*, 323 NLRB 207, 209 (1997).

Here, the testimony is clearly "rationally probative," and is corroborated by Scatigno's testimony of what Massa said directly to him. It is therefore appropriate to reply on such testimony as substantive evidence.

In addition to the 28 cards that Massa obtained on May 16, Massa signed his own card on that date, obtained one card on May 15, two others on May 17, and one card which was dated May 3. I find that this card was misdated, since it is clear that Massa didn't solicit any cards at that time. I conclude that this card was obtained also somewhere between May 15 and 17. Massa also received a signed card from Frisina, dated May 1. Frisina, however, testified that he signed the card, after Respondent recognized and signed a contract with Local 713, and he signed up only to obtain medical benefits from Local 713, retroactive to May 1.

On May 17, Hasho came to Respondent's facility and Massa gave him the 33 cards that he had solicited from Respondent's employees and Massa assured Hasho that these cards represented a majority of Respondent's employees. Thereafter, Respondent and Hasho on behalf of Local 713 arranged for George Sabatella, an arbitrator that Hasho had used before, to conduct a card check.

The next day, May 18, Sabatella came to the facility. Sabatella, checked the cards against Respondent's payroll, and issued a certification of majority status agreement dated May 18. On May 22, Respondent and Local 713 entered into a collective-bargaining agreement, which provides for a standard union-security clause. Although the contract has been enforced, Respondent has not enforced the union-security clause and has not deducted dues from its employees.

On May 17, Local 707 filed a petition to represent Respondent's drivers, which petition is apparently blocked by the instant complaint.

III. ANALYSIS

A. The Status of Massa

Section 2(11) of the Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is clear that the possession of any one of the indicia specified above is sufficient to confer supervisory status on an employee. *Sunnyside Farms*, 308 NLRB 346, 347 (1992); *Louisiana Gas Service Co.*, 303 NLRB 908, 921 (1991).

I conclude that the General Counsel has established sufficient credible evidence to meet its burden of proof that Massa exercised independent judgment in connection with Section 2(11) activities. Thus, the record reveals several instances where Massa received complaints from employees about problems on their routes and that Massa resolved these problems by effectuating changes in their routes, such as having them no longer assigned to Southern Container or to be assigned to U.S. Postal routes.[19] This evidence establishes that Massa used independent judgment in both assigning work and in adjusting grievances, and is sufficient to find that he is a supervisor under Section 2(11) of the Act. *Sunnyside Home*, supra; *Louisiana Gas*, supra; *Polynesian Hospitality Tours*, 297 NLRB 228, 238–239 (1989); *Cannon Industries*, 291 NLRB 632 (1988).[20]

Additionally, the record reflects that Massa had an extensive role in Respondent's hiring process. Thus, it appears that he hired or effectively recommended the hire of Smith, since after interviewing Smith, ordered Vinny to give Smith a road test, and introduced Smith to Frisina as "our new employee who is starting next week." Massa interviewed other applicants and gave prospective employees road tests. I therefore find that Massa's role in the interview process is also supportive of his supervisory status. *Holly Farms Corp*., 311 NLRB 273, 293 (1993).

Additional factors in the record which further support my finding that Massa was a supervisor, include the facts that employees consider him to be a supervisor, *K.B.I. Security*, 318 NLRB 268, 269 (1995); *Baby Watson Cheesecake*, 320 NLRB 779, 784 (1996); Massa had his own office, *Holly Farms*, supra, and *Louisiana Gas*, supra; Massa reprimanded several employees for various transgressions, and Massa authorized employees to have their trucks repaired.

Accordingly, based on the foregoing, I find that Massa was a supervisor under Section 2(11) of the Act.

Moreover, even if I were to find the evidence insufficient to establish Massa's supervisory status, I agree with the General Counsel that the evidence is more than sufficient to prove that Massa was an agent of Respondent. In this regard, the test is whether under all the circumstances, the employees would reasonably believe that the employee in question (the alleged

[18] Here, not only was no objection made to the question, but the testimony was elicited from Scatigno during cross-examination by the representative for Local 713.

[19] I also note the incident where Winkler asked Massa whether Winkler should continue on his route or bring his truck in for repairs. Massa made the decision, without checking with anyone, that Winkler should finish his run, notwithstanding Winkler's recommendation to the contrary.

[20] It is true that in some of the above instances Massa told the employee, "I'll see what I can do," before the decision was effectuated, leaving open the possibility that Massa needed and received approval from higher management before the changes were made. However, even if that were the case, Massa's role in effectively recommending these changes in assignments would be sufficient to establish that he is a supervisor under Sec. 2(11) of the Act.

agent) was reflecting company policy and acting for management. *Zimmerman Painting & Heating*, 325 NLRB 106 (1997); *Victor's Café 52*, 321 NLRB 504, 513 (1996); *Kosher Plaza Supermarket*, 313 NLRB 74, 85–86 (1993). The facts here establish, based even on Massa's own testimony, that he was a conduit for communicating management's views and directives to employees.[21] Thus, many of the incidents described above, where changes in job assignments were made by Massa, even if as Massa testified, he was merely transmitting higher management's instructions, would be a clear indication that Respondent placed him in a position so that employees would reasonably believe that he was speaking for management. *Zimmerman*, supra; *Great American Products*, 312 NLRB 962, 963 (1993); *Victor's Café*, supra; *Kosher Plaza*, supra; *Jacobo Marti & Sons*, 264 NLRB 30, 32 (1982).

Other evidence supportive of this reasonable belief of employees, were (1) the incident where Massa called Albanese at home while he was on sick leave and asked him when he was coming back, and told him that Respondent needed him because, "its busy"; and (2) when Melendez recommended to Frisina that Respondent attempt to persuade one of Respondent's accounts to rent boxes and trailers from Respondent, Frisina replied, that it was a good idea and rather than dealing with the request himself, brought Melendez into see Massa about it. Massa immediately responded to Melendez' suggestion, by calling the client and stating, "[M]y driver says you are renting boxes from an outside company." This incident strongly enforces the perception that several employees testified that they had, that Massa was higher in management's hierarchy than Frisina, Respondent's general manager and an admitted supervisor.[22]

Finally, I also note that Massa admittedly distributed authorization cards to employees at Respondent's facility, and during working hours, which in and of itself is a significant indication that he was acting for Respondent. *Baby Watson*, supra at 785, *Dentech Corp.*, 294 NLRB 924, 926 (1989).

Accordingly, based on the foregoing, I conclude that even if Massa was not a supervisor under Section 2(11) of the Act, he was clearly an agent for Respondent, and that Respondent was responsible for his conduct in soliciting cards for Local 713.

B. The Alleged Unlawful Assistance to Local 713

My findings above that Massa was a 2(11) supervisor and or an agent of Respondent, leads to the conclusion that Respondent committed a number of violations of the Act, by virtue of Massa's conduct. Thus, it is not disputed that Massa distributed Local 713 cards to employees and either directed or asked employees to sign such cards. Such conduct is coercive and unlawful, even in the absence of any threats or promises of benefit. *Baby Watson*, supra at 705; *Kosher Plaza*, supra at 84; *Famous Castings Corp.*, 301 NLRB 404, 407 (1991). Therefore, I conclude that Respondent has violated Section 8(a)(1) and (2) of the Act.

Additionally, during his efforts to solicit employees to sign cards for Local 713, Massa made threats to employees that they would lose their jobs if they did not sign cards for Local 713. These comments are clear violations of Section 8(a)(1) and (2) of the Act. I so find. *Baby Watson*, supra; *Brown Transport Co.*, 296 NLRB 552, 553 (1989).

Similarly, Massa promised employees wage increases and greater medical benefits if they signed cards for Local 713. Such comments are violative of Section 8(a)(1) and (2) of the Act. *Baby Watson*, supra; *Christopher Street Owners Corp*., 286 NLRB 253, 254 (1987).

Turning to Respondent's recognition of Local 713, I have found that Local 713 submitted 33 cards[23] for the cards count. Therefore, Local 713 did obtain cards from a majority of employees in the unit, since as of the week of May 15, Respondent employed 54 employees. However, the General Counsel contends that Local 713 did not represent an uncoerced majority of employees, due to Massa's status and conduct during the solicitation of the cards. I agree.

Since I have concluded above that when Massa solicited the cards, he made unlawful threats and promises to 14 employees, their cards were invalidated, whether Massa is considered either a supervisor or agent of Respondent. That reduces Local 713's card count to 19, which is short of majority status and leads to the conclusion that Local 713 did not represent an uncoerced majority of Respondent's employees.

Moreover, since I have found, as related above, that Massa is a supervisor and agent of Respondent, all of the cards solicited by him are tainted and invalid. It is undisputed that Massa solicited each and every card obtained by Local 713. Therefore, none of the cards of Local 713 represent an uncoerced choice of Local 713 as the representative of Respondent's employees.

Accordingly, Respondent's recognition of Local 713, notwithstanding that the arbitrator certified it as the representative of Respondent's employees, is unlawful and violative of Section 8(a)(1) and (2) of the Act. *Windsor Castle Health Care Facilities*, 310 NLRB 579, 590 (1993), enfd. 13 F.3d 619 (2d Cir. 1994); *Famous Castings*, supra; *SMI of Worcester, Inc.*, 271 NLRB 1508, 1520–1523 (1994).

I also conclude that since the contract that the parties executed contained a union-security clause, that by this conduct, Respondent violated Section 8(a)(1), (2), and (3) of the Act.

C. The Termination of Albanese, Melendez, Aprile, Smith, and Winkler

In assessing the legality of Respondent's conduct in terminating the five discriminatees, it must first be determined whether the General Counsel has established that a motivating factor in Respondent's decision was the union or protected activity of the employees. *Wright Line*, 251 NLRB 1083 (1980). Once the General Counsel has met that burden of proof, the burden shifts to Respondent to prove by a preponderance of the evidence, that it would have taken the same action absent the employees' protected conduct. *Wright Line*, supra;

[21] Thus, Massa testified that he was a "buffer zone" between management and employees.

[22] In that regard, I note that Massa and Frisina were paid the same salary.

[23] Although Local 713 obtained 34 cards, 1 of them was signed by Frisina, admittedly, a supervisor. Thus, his card cannot be counted.

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

Here, I conclude that the General Counsel has met its initial burden of proving that protected conduct was a motivating factor in Respondent's decision to terminate five employees. Initially, I rely on the timing of the terminations of these employees. They occurred on the next working day after the union meeting, and within 2 weeks after the union organizing began at Respondent for Local 707. I conclude that this "astonishing timing," *Fiber Products*, 314 NLRB 1169, 1186 (1994), which can also be aptly characterized as "stunningly obvious," *NLRB v. Long Island Airport Limousine Service*, 468 F.2d 292, 295 (2d Cir. 1972), provides substantial evidence of antiunion motivation. *Trader Horn of New Jersey, Inc*., 316 NLRB 194, 198 (1995); *Knoxville Distribution Co*., 298 NLRB 688, 696 (1990). Indeed, "timing alone may suggest antiunion animus as a motivating factor in an employer's action." *Cell Agricultural Mfg. Co*., 311 NLRB 1228, 1232 (1993); *Trader Horn,* supra; *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984); *Sawyer of Napa*, 300 NLRB 131, 150 (1990).

Additionally, there is no question that all five were union adherents, inasmuch as all five attended the union meeting, discussed the union and the meeting with other employees prior thereto, three of them signed cards for the Local 707 before the meeting, and one (Aprile) signed a card at the meeting.

Moreover, Respondent's action in unlawfully assisting Local 713, by having its supervisor and agent solicit cards from employees, accompanied by unlawful threats of job loss and promises of benefits, and thereafter recognizing Local on the basis of these tainted cards, evinces strong evidence of animus towards employees' rights to select the union of its own choosing, Local 707.

That leaves the issue of knowledge of protected conduct, which Respondent argues forcefully, that the General Counsel had not established, an omission, which is fatal to its case. *Beaver Valley Canning Co. v. NLRB*, 332 F.2d 429, 433 (8th Cir. 1964); *Eastman Kodak Co.*, 194 NLRB 220 (1971). However, while Respondent is correct that it is essential for the General Counsel to establish knowledge of protected conduct, it is well settled that direct evidence of employer knowledge is not required, but it may be proven by circumstantial evidence from which a reasonable inference may be drawn. *Matthews Industries*, 312 NLRB 75, 76 (1993); *Abbey's Transportation Services*, 284 NLRB 698, 700 (1987); *Dr. Frederick Davidowitz*, 277 NLRB 1046, 1049 (1985); and *BMD Sportswear Co.*, 283 NLRB 142, 143 (1987). Examples of the type of circumstantial evidence which can be relied on to establish knowledge of protected conduct, include timing of the termination in relation to the employees protected activities, the employees demonstrated animus, and the pretextual reasons for terminations asserted by the employer. *Abbey's Transportation*, supra*; BMD*, supra*; Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993).

Here, I conclude that all of the above factors are present, as well as other circumstantial evidence, which tends to persuade me that a reasonable inference can be drawn, that Respondent was aware of the protected conduct of the discriminatees prior to Respondent's decision to terminate them.

In that regard, Respondent argues that although the terminations (characterized by Respondent as a layoff) took place on May 15 (four employees) and 16 (one employee, Aprile, whose day off was on May 15), that it had decided to lay them off on Friday, May 12, which was prior to the date of the meeting. Therefore, it contends that the General Counsel's reliance on the meeting of May 13 to establish knowledge is misplaced, and that the meeting cannot be relied on to establish that Respondent was aware of the employees interest in Local 707. I do not agree. Initially, I note the evidence is far from clear that Respondent had made a final decision as to which employees would be laid off on May 12. Indeed, while Melendez noticed the word "off" next to his name for Monday, May 15, on Friday, May 12, he was told by Vinny that Vinny did not know why Melendez was off, and suggested that he speak to Frisina. Albanese was told by Vinny on Friday, May 12, to call on Monday to see if there was work, because work was slow. Smith, at around 3 p.m., was told by Vinny that he had to work on Saturday, May 13, the day of the union meeting. Only after Smith refused to work on Saturday, was Smith informed by Massa to hand in his radio, "since he wouldn't work on Saturday." Later on in the day, Smith spoke to Vinny, who told him that it was "slow," and instructed Smith to call Frisina on Monday to see what was going on.

Similarly, Winkler was also asked to work overtime on Saturday, and he refused to do so. Winkler was not told about his layoff until Sunday (after the meeting), when he called as he normally does, and was also told by Vinny that work was slow and to call on Monday.

Aprile, whose regular day off was Monday, May 15, was not told anything about being laid off until Monday, when he called as per normal to find out his assignment for Tuesday, May 16, and was told by Frisina that he was not scheduled because things were "slow."

The above evidence strongly indicates that no final decision had been made by Respondent to lay off any of the discriminatees until Sunday or Monday, after the union meeting. Indeed, even though Vinny did tell Melendez, Albanese, and Smith that they were "off" on Monday, he told them both to call Frisina on Monday to see if there was work available. Thus, these comments were equivocal, suggesting that there still might be work for them on Monday. In fact, Albanese reported for work on Monday and was given an assignment that morning, before being told in the midst of that route that he was laid off. Further, Respondent's own payroll records, while reflecting that by the week ending of May 19, Smith, Melendez, and Winkler were listed as "terminated," both Aprile and Albanese had no such listing next to their names apparently due to Albanese working on one job on May 15, and to the fact that Aprile's day off is Monday, May 15.

I find it highly suspicious that both Winkler and Smith were asked to work overtime on Saturday, May 13. Only after they refused Respondent's request to work on the day of the scheduled union meeting, were they informed of their layoff. Particularly, in the absence of any explanation from Respondent as to why it would ask two employees to work overtime on Saturday, May 13, while laying them off, allegedly for lack on work on Monday, May 15, it is reasonable to conclude which I do,

that Respondent was testing these employees to see if they intended to go to the union meeting. Obviously, if they agreed to work on Saturday, they would not be able to attend the union meeting. Once they refused, then Respondent in my judgment had confirmation that they intended to attend the Local 707 meeting.

This conduct further confirms my conclusion that Respondent became aware of the organizing activity of the employees, as well as the fact that a meeting was scheduled for Saturday, May 13. I also find that Respondent became aware of which employees attended the meeting, and terminated five of the seven employees who attended the meeting.

Even if I were to find that Respondent had made a final decision to lay off the employees on Friday, May 12 (before the meeting), the circumstantial evidence still supports the conclusion that Respondent became aware of the organizing and the union meeting, as well as which employees were expected to attend, prior to Friday, May 12. The circumstantial evidence supporting this conclusion, in addition to the close proximity between the decision to layoff and the organizing and the discussions among employees about the meeting, also includes the unlawful assistance to Local 713 on Tuesday, May 16, the day after the terminations began. I find this coincidence too suspicious to ignore, and clearly contradictory to Frisina's testimony that Respondent knew nothing about Local 707's organizing until the Local 707 petition was received, sometime after May 17. There is no logical explanation for Respondent's sudden decision to have Massa, (a close acquaintance of Meyers), its supervisor and agent, call in Local 713, and as I have found, coerce its employees to sign cards for this Union, other than the fact that Respondent was aware of Local 707's organizational activities, and sought to sign up with a union with whom it would prefer to deal. I note in this connection that Massa had previously been a member of Local 713, and likely informed Meyers that Respondent would be better off signing a contract with Local 713 (an unaffiliated Union), rather than be faced with the possibilities of having to recognize Local 707, affiliated with the Teamsters. It also follows that Respondent would be desirous of ridding itself of Local 707 adherents before it engaged in its unlawful assistance. Indeed, if the Local 707 supporters were still employed, while Respondent was calling employees one by one into Massa's office and coercing them to sign cards for Local 713, it is likely that they would have attempted to interfere with this blatant assistance to Local 713 by perhaps so informing their fellow employees, or notifying Local 707. But, if these Local 707 adherents were terminated, the unlawful recognition of Local 713 would be likely to go smoothly as it did without their presence. Therefore, I conclude that the unlawful assistance to and recognition of Local 713 on May 16 and 18, 1 to 2 days after the terminations, provides compelling circumstantial evidence that Respondent knew or at least suspected that the five discriminatees were supporters and had attended or intended to attend the May 13 Local 707 meeting.

Further, circumstantial evidence supporting this conclusion is provided by the fact that Respondent laid off a disproportionate number of supporters of Local 707. The Board, supported by the courts, has long held that where, as here, a layoff or termination includes a disproportionate numbers of union adherents, this constitutes persuasive evidence of discrimination. *Huck Store Fixture Co*., 334 NLRB 119 (2001); *Glenn's Trucking*, 332 NLRB 880 (2000); *American Wise Products*, 313 NLRB 989, 994 (1994); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994); *Hedison Mfg. Co.*, 249 NLRB 791, 804 (1980); *Camco, Inc*., 140 NLRB 361, 365, enfd. in part 349 F.2d 803, 810 (5th Cir. 1965); *NLRB v. Nabors*, 196 F.2d 272, 375–376 (5th Cir. 1982); and *NLRB v. Chicago Steel Foundry*, 142 F.2d 306, 308 (7th Cir. 1944).

As part of creating the inference of discrimination, it has been held that knowledge of union activity can be inferred from the disproportionate number of union adherents. *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993) (eight employees discharged, six of whom were union supporters); *NLRB v. Camco*, supra (employer discharged 11 of 16 union adherents).

The Board in *Camco*, supra, dealt with the argument made by Respondent here that the large percentage of union adherents selected was a coincidence. There, the employer selected only those 11 employees who attended a union meeting. The Board held, "While it may be theoretically possible that the Respondent may have fortuitously selected for termination only those employees active in the Union, common sense and the laws of mathematical probability indicate that such fortuity was highly improbable."

As the D.C. Circuit phrased the issue in *Chicago Steel*, supra, "To be sure, percentage evidence; standing alone will not support or sustain an order based on Section 8(3) of the Act. . . . But the disproportionate treatment of union or nonunion workers may be very persuasive evidence of discrimination . . . and may create an inference of discrimination leaving it to the employer to give an adequate explanation of the discharge or layoff." Id. at 308.

The principles applied in the above cases are present in the instant case. Respondent terminated or laid off five employees, all of whom attended the union meeting on May 13, while not terminating two employees who attended the meeting. These employees included the two main organizers for Local 707, three of whom signed cards before the meeting. A fourth employee signed a card at the meeting. Respondent also terminated or laid off[24] 3 or 4 other employees out of a bargaining unit of 60 employees. Thus, I conclude that the selection of the great proportion of union adherents for termination was not mere coincidence, but persuasive evidence that the probability is very high that the layoffs were discriminatorily motivated. *Hedison*, supra (21 employees laid off, 19 signed cards, and 8 attended union meeting); *Holding Co.*, 231 NLRB 383, 390 (1977) (40 percent of the employees who attended the union meeting were discharged); *Camco*, supra (16 employees attended a union meeting, and 11 were terminated, out of a unit of 95 employees); *NLRB v. Nabors*, supra (23 of 26 discharged were union men, 13 of 23 attended the union meeting; 60 em-

[24] I have used the term laid off or terminated interchangeably in this decision with regard to Respondent's conduct, because as discussed below the record is unclear whether the employees were terminated or laid off.

ployees were retained who had less seniority than those discharged); *Davis Supermarkets*, supra (eight employees laid off, six of whom were union supporters); *Huck Store*, supra, (respondent laid off 27 employees who had not signed antiunion petition (21 out of 79) but only 6 percent of employees who had signed petition (5 out of 81), 5 of 11 employees discharged on March 4 signed cards for union, and 10 of 12 laid off on March 11 had signed cards).

Somewhat related to this issue is the status of employee John Ponce. Ponce was not invited to attend the union meeting by Smith because Smith did not trust him. Nonetheless, Ponce showed up at the meeting, and after asking Smith to identify who else was at the meeting, and receiving this information, left the meeting after a few minutes and did not return. Not surprisingly, Ponce was not among those laid off, although he was at the meeting. The above facts create a strong suspicion that Ponce was the source of Respondent's information as to who attended the May 13 meeting.[25] *Mathews Transportation*, supra, 296 NLRB at 432 (Board infers knowledge in part from finding that "informer" disclosed union activities of employees to employer); *Grey's Colonial Boarding Home*, 287 NLRB 877, 882 (1987) (employee who refused to sign an authorization card for union, "might well have been the source" of employer's knowledge).

As I have detailed above, another significant indication of employers knowledge is the pretextual nature of the employer's decision to terminate or layoff the employees. It is to that issue that I now turn. In that regard, I agree with the General Counsel and the Charging Party that the evidence discloses that the grounds asserted by Respondent for its decision to terminate the employees is pretextual, both as to the necessity for the alleged layoff itself as well as the selection of the employees for termination. The first problem with Respondent's defense, and it is a huge one, is its failure to call Mike Meyers as a witness. Meyers was as Frisina testified, the official of Respondent who made the decision that layoffs were necessary, because post office work was declining as a result of the end of the proxy season. Moreover, it was Meyers who allegedly received information from the post office representative as to the decline of post office work. Meyers also according to Frisina, collaborated with Frisina on the decision as to which employees to layoff, including among other things the decision not to consider seniority in Respondent's decision.

I find that the failure to call Meyers as a witness in these circumstances is particularly damaging to Respondent's case, and gives rise to an adverse inference, which I find appropriate to draw, that his testimony if offered would not have been favorable to Respondent's case. *National Assn. of Government Employees (IBPO)*, 327 NLRB 676, 699 (1999); *United Parcel Service*, 321 NLRB 300 fn. 1, 308–309 fn. 21 (1996); *Ready Mix Concrete*, 317 NLRB 1140, 1143 fn. 16 (1995); *Basin Frozen Foods*, 307 NLRB 1406, 1417 (1992); *White Plains Lincoln Mercury*, 288 NLRB 1133, 1150 fn. 13 (1988).[26]

Additionally, an examination of the testimony of Frisina, who was Respondent's only witness with respect to the issue of its decision to layoff was vague, unconvincing, and filled with significant contradictions and inconsistencies. Thus, Frisina testified that work was "slow," allegedly because of the reduction of postal service work due to the end of the proxy season. However, he provided no further details as to how much work was lost, how many trucks were needed or reduced, or how much overtime Respondent needed to complete its work during the period of the layoff. More importantly, it introduced no records or any other probative documentary evidence to establish the loss of work that allegedly necessitated a sudden layoff of its work force. The failure of an employer to produce relevant evidence particularly within its control allows an adverse inference that such evidence would not be favorable to it. *NLRB v. Shelby Memorial Hospital*, 1 F.3d 550, 563 (7th Cir. 1993). I find such an inference appropriate here.

The only documentary evidence introduced by Respondent in support of its case, was the letter, allegedly from Simpson of the post office to Meyers, dated May 12. While on its face this document appears to be supportive of Respondent's position, I find the document to be of no probative value in the circumstances herein. The facts are clear that Respondent did not have this letter in its possession at the time of its decision to layoff employees, and in fact it was not received until June 14, a month after the layoffs began. There can be little question that this document, even if authentic,[27] was nothing more than an attempt by Respondent to justify its decision during the investigation of the charges, and that Simpson simply wrote what Meyers asked him to write. The failure of Respondent to call Meyers as a witness is also critical in evaluating this document, since he was the one it was allegedly addressed to, and who according to Frisina, had discussed its contents with Simpson prior to the layoffs. However, the failure of Meyers to testify to these facts and to corroborate Frisina's hearsay testimony is again significant, and once more permits an adverse inference that his testimony would be unfavorable to Respondent on this issue.

Frisina's testimony with respect to this document is particularly revealing and damaging to his credibility as a whole. Thus, on direct testimony, Frisina testified that as a result of Respondent's receipt of the letter, which was dated May 12, he and Meyers decided on May 12 that Respondent needed to layoff some employees on Monday, May 15. Interestingly, Frisina slipped a bit in his testimony, by candidly admitting that work "slowed down a little but."

[25] As noted above, I have also found that Respondent by virtue of Smith and Winkler having turned down overtime work for the day of the meeting, had reason to believe that they intended to attend the meeting.

[26] Indeed, it is also appropriate to conclude that Meyer's testimony as to knowledge of the discriminatees' union activity would be contrary to Respondent's position, as expressed by Frisina, that it had no such knowledge.

[27] I note that since neither Meyers nor Simpson testified, the document was not properly identified. It was received in evidence, without objection, as a document kept in the ordinary course of business. However, in my view it does not fall within the business records exception to the hearsay rule, since it is not part of the regular course of business for Respondent to receive such a letter.

On cross-examination, Frisina changed his testimony as to the letter, by admitting that he only "assumed" that Meyers received it on May 12. When it was pointed out the fact on the letter indicated it was not received by Respondent until June 14, he also pointed out that he was sure that a copy was faxed over at the time, but then conceded that he did not know about the letter until several days later. Finally, Frisina testified that the decision to lay off was made on May 10, 2 days before the date of the letter. Thus, his disingenuous and inconsistent testimony as to this letter reflects poorly on his credibility, as well as damaging any reliance that can be placed on the document.

Further, and most importantly, Frisina admitted that the proxy season ended in March. While he tried later on to change that testimony in response to a clearly leading question by Respondent's attorney, I credit his earlier version and find that the proxy season ended in March. This admission thoroughly destroys Respondent's defense that the end of the proxy season, and the resultant loss of post office business, motivated the layoffs. Thus, the proxy season ended in March, but Respondent did not lay anyone off at that time, but instead hired nine employees in March, eight in April, and one on May 1. Thus, it does not appear that the end of the proxy season caused a significant loss of work, since Respondent continued to hire employees thereafter, and Respondent has introduced no probative evidence that a significant slowdown in work occurred on May 15 or at any time before that. *Cell Agricultural Mfg. Co.*, 311 NLRB 1228, 1233 (1993).

The credibility of Respondent's defense is further diminished by several other factors, all of which in one way or the other, place into question Respondent's assertion, that Respondent's financial condition as of May 15 required it to lay off 15 percent of its work force. These factors, include the fact that, Respondent was regularly assigning significant amounts of overtime[28] to employees during the weeks immediately prior to the layoff, including asking two discriminatees to work overtime on Saturday, May 13, 1 day before the layoff. *Leather Center, Inc.*, 308 NLRB 16, 30 (1992); *United Hydraulic Services*, 271 NLRB 107 (1984). Also, Respondent continued to place advertisements for employees in the newspaper, even while laying off employees allegedly for lack of work. *White Plains Lincoln Mercury,* supra, 288 NLRB at 1152. Further, while there is no evidence that Respondent ever laid off any employees before, the undenied and credited testimony of Melendez establishes that during Christmas 1999 work was slow because one of Respondent's customers closed down for the week. At that time, Respondent rather than laying off any employees, asked employees to "voluntarily" take same time off. The failure of Respondent to use this voluntarily procedure, as it did in the past when it had a temporary reduction of work, further damages Respondent's defense. *Cooke's Crating, Inc*., 289 NLRB 1100 (1988).[29]

Thus, I conclude that all of these factors, plus Respondent's conduct in hiring employees in the period shortly prior to the layoff and after the alleged reduction in post office business, all demonstrate that there was no substantial business reduction on May 15 that motivated Respondent's decision to lay off nine employees. Indeed, Frisina's candid admission that business was reduced "a little bit," further enhances that conclusion. I believe that there may have been a slight reduction of work, as a result of the proxy season ending, but that reduction which occurred in March, did not motivate Respondent to lay off nine employees on May 15. Rather, the evidence establishes that Respondent was motivated by the appearance of Local 707 organizing its employees, and Respondent's desire to avoid having to recognize that union.[30]

Turning to the alleged reasons that Respondent selected the five discriminatees for layoff, Frisina's testimony on this issue, was again vague, contradictory, and unconvincing. Thus, he testified initially that he included Albanese, Melendez, Smith, and Aprile because of alleged problems with Southern Container, one of Respondent's main accounts. While Albanese did admit that he had a problem with this account and had in fact requested not be sent there, no such evidence was adduced with respect to the other employees. In that regard, Frisina testified that he received complaints about these employees from various unnamed officials of Southern Container who allegedly did not want them sent back there. However, Respondent never documented any of these complaints, and never warned any of the employees about these alleged complaints. He also did not testify as to when he received the complaints or precisely who spoke to him about these problems. Frisina's testimony, as to Aprile, is completely contradicted, since Aprile continued to serve Southern Container exclusively until his layoff. Frisina provided no explanation as to why, if Southern Container had requested that Aprile not be sent back there, he continued to assign him to that account.[31]

Initially, Frisina testified that he selected Winkler for layoff because he had two accidents and because he blew out two engines of his truck. However, later on his testimony, Frisina changed that testimony, and included Winkler as well as the other employees, in the group of employees who had complaints from Southern Container about their conduct.

Although, Winkler admitted that he did have two accidents in 2000, both accidents were not his fault, and the record reflects that Respondent did not contend otherwise. Nor did the record reflect that there was significant damage to Respondent's trucks as a result of the accidents. Moreover, Respondent did not issue Winkler any written or oral warnings for

[28] Thus, several discriminatees were working 55–60 hours a week, the weeks before the layoff.

[29] Once again the failure of Respondent call Meyers is significant in this area. Frisina was employed by Respondent since May 1999. Not only did he not deny Melendez' testimony in this regard, but Meyers did not testify to either deny such testimony or to testify about its practice in prior years. Indeed, since Respondent has been operating since 1994, it may have had prior voluntary layoffs, or even other prior layoffs, where it may have utilized seniority to select employees. It is once more appropriate to draw an adverse inference that Meyer's testimony would be adverse to Respondent in these areas.

[30] Once again, I emphasize the close proximity in time between the organizing of the employees, the union meeting on May 13, the layoff of May 15, and the unlawful assistance to Local 713 on May 16–18.

[31] It is also notable that Scatigno, who did not attend the union meeting, was not selected for layoff, although he admitted that he had a problem at Southern Container and had specifically requested not to be sent to work there.

either of these accidents. As for the blown engines, Winkler's unrefuted testimony establishes that the engines were blown as a result of Massa's decision to order Winkler to continue to finish his route, although Winkler warned Massa that the truck was overheating. Further, Respondent placed a termination document in Winkler's file, dated May 12, reflecting that he was terminated because of "accidents." This document makes no mention of the blown engines nor the alleged complaints about Winkler from Southern Container, as reasons for Winkler's termination, and in fact, is also inconsistent with Frisina's testimony that Winkler was laid off because work was slow.

This brings me to an evaluation of whether, in fact, Respondent laid off or discharged the five discriminatees. While Frisina testified that Respondent laid off these employees as well as four other employees, because work was "slow," I find this testimony to be of dubious reliability, in view of the evidence in the record. In addition to the termination document for Winkler described above, I note that Respondent's own payroll records designate these employees as "terminated." While this designation in the records could have a benign interpretation, no explanation was offered by Respondent in this regard. Also, when Albanese returned to Respondent's facility to turn in his keys and radio as instructed, he spoke to Frisina. Frisina at that time, told Albanese, "[Y]ou're done. There's nothing for you." This remark by Frisina, although somewhat equivocal, does not suggest a temporary layoff. Indeed, the statement, "You're done," sounds much more like a discharge and that Respondent had no intention, at that time, of recalling him.

Respondent's subsequent conduct with respect to the discriminatees, as compared to the other four employees allegedly "laid off" at that time, serves to reinforce my conclusion. True, Respondent did in fact reinstate or offered to reinstate all of the five discriminatees sometime in June. However, since these offers were made only after the instant charges were filed, it is reasonable to conclude which I do, that this action was merely an attempt to cut off its backpay liability, rather than evidence that its initial action was contemplated to be only a layoff. However, the other four employees, allegedly laid off at the same time for the same lack of work, were not offered their jobs. The only explanation provided by Frisina for not doing so, is his testimony with respect to Jennings, "because his was a blatant order for dismissal at that point." This testimony makes clear that Jennings was discharged at that time, and suggests that all the employees were discharged as well. Frisina also testified that Bryson another employee allegedly laid off had "wrecked a trailer," much more serious misconduct that Respondent alleged to have been committed by the discriminatees. The other two employees allegedly laid off, according to Frisina, had unspecified "performance" problems. Interestingly, with respect to reasons for the selection of the ninth unnamed employee, Frisina testified, "[P]erformance or it could have been a recent hire." This admission constitutes a significant variation from Frisina's earlier insistence that Respondent did not consider seniority in its selection of employees. This represents but another of the numerous inconsistencies in the testimony of Frisina, which further detracts from his credibility, as well as the validity of Respondent's defense.

The above detailed evidence persuades me that Respondent, contrary to Frisina's testimony, intended to discharge all nine of the employees in mid-May. I also find that it did so not because of any slowdown in work, but because of the advent of Local 707's organizing campaign, and Respondent's preference for dealing with Local 713. Indeed, this is the only reasonable explanation for the choice of mid May for its decision to terminate employees, for an alleged slowdown in work that began in March. I find that work did slowdown as Frisina testified, "a little bit," and Respondent seized on that opportunity to rid itself of five union adherents, and to include four other employees with whom it was dissatisfied at the time.

I would add, that even if I were to find that as Frisina testified Respondent intended to lay off the five discriminatees, its failure to recall the other four nondiscriminatees, further detracts from the validity of its defense. Thus, in that case, since it did not reinstate the four nondiscriminatees, one can only conclude that these four employees were discharged, which is confirmed by Frisina's own testimony that Jennings was dismissed and Bryson had "wrecked a trailer." Therefore, in that scenario, Respondent laid off only five employees, all of whom attended the union meeting and were union adherents, and laid off no one else. This makes the proportion of union adherents laid off even more suspicious. Since Respondent recalled the discriminatees within 1-1/2 months, I would then find that Respondent intended only to temporarily remove the discriminatees from its work force during Respondent's unlawful assistance to Local 713, so as to facilitate its unlawful recognition of Local 713 and the consequent elimination of any possible obligation to recognize Local 707, a union with whom Respondent did not wish to deal.

Accordingly, based on the above analysis and authorities, I conclude that Respondent's explanations for its decisions to lay off or terminate its employees is pretextual both as to its reasons for the layoff itself, as well as the selection of employees for layoff.[32] Therefore, since I have so concluded, I also find compelling circumstantial evidence that Respondent knew or suspected that the five discriminatees were union adherents when they were terminated on May 15. In sum, this circumstantial evidence includes the close proximity in timing between the terminations and the union organizing, union meeting, and significantly Respondent's unlawful assistance. This evidence, coupled with the high proportion of union supporters terminated, the pretextual nature of the terminations, and the possibility of an informer, are collectively sufficient to persuade me that Respondent was aware of the discriminates' union support when it decided to terminate them.

Having made that conclusion, it follows that the General Counsel has presented a compelling case that Respondent's decision to terminate the employees was motivated by their

[32] I have considered Respondent's citation of *Eastman Kodak*, supra, in support of its position, but find that case to be clearly distinguishable. Thus, while the Board therein did reverse an ALJ's decision to find knowledge of union activity, based on attendance at a union meeting, in that case, unlike here, it was undisputed that the layoff itself was lawful, and only the selection was in question. Here, as I have detailed above, I conclude that Respondent has not established that the layoff was motivated by economic reasons.

activities on behalf of and support for Local 707. *Wright Line*, supra.

Since I have already concluded that Respondent's purported defenses are pretextual, it also follows that Respondent has not met its burden of establishing that it would have taken the same action, absent the employees' protected conduct. Therefore, Respondent has violated Section 8(a)(1) and (3) of the Act. I so find.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 707 and Local 713 are labor organizations within the meaning of Section 2(5) of the Act.

3. By soliciting, instructing and ordering its employees to sign authorization cards on behalf of Local 713, threatening its employees with discharge if they did not sign authorization cards for Local 713, and promising its employees wage increases, medical benefits, and other improvements in their terms and conditions of employment, in order to induce the employees to sign authorization cards for Local 713, Respondent has violated Section 8(a)(1) and (2) of the Act.

4. By recognizing Local 713 as the collective-bargaining representative of its employees, on May 18, 2000, and subsequently executing a collective-bargaining agreement with Local 713, which agreement contained a union-security clause, notwithstanding the fact that Local 713 did not represent an uncoerced majority of Respondent's employees, Respondent had violated Section 8(a)(1), (2), and (3) of the Act.

5. By discharging or laying off its employees, Dwight Melendez, Anthony Smith, Raymond Albanese, Thomas Winkler, and Robert Aprile, because of their activities on behalf of and support for Local 707, Respondent has violated Section 8(a)(1) and (3) of the Act.

6. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since Respondent had reinstated or offered to reinstate all of the discriminatees, the General Counsel does not seek, and I shall not recommend any reinstatement remedies. However, I shall recommend that Respondent make whole the five discriminatees for any loss of earnings and other benefits that they may have suffered by reason of Respondent's discrimination against them. All backpay provided shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is also appropriate to recommend that Respondent cease and desist from recognizing or signing a contract with Local 713, unless and until Local 713 is certified as the collective-bargaining representative of its employees in an NLRB election. Since the General Counsel concedes that Respondent has not deducted any dues, pursuant to its unlawful union-security clause in its collective-bargaining agreement with Local 713, it is not necessary to order the standard remedy of dues reimbursement.

[Recommended Order omitted from publication.]